

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRANSCRIPT OF RULING ON MOTION TO COMPEL DISCOVERY

BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES DISTRICT JUDGE

APPEARANCES (All present by video or telephone):

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1 I N D E X

2 RULINGS:

Motion to Compel Discovery Granted in
3 Part and Denied in Part

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1 THE COURT: Hello. Good afternoon. This is Judge
2 Levy. We're here on docket number 19-CV-6, Singer, et al. v.
3 Bank of Palestine. Will Counsel please state their appearances
4 for the record.

5 MR. OSEN: Good afternoon, Your Honor. This is Gary
6 Osen of Osen LLC representing the plaintiffs today. Mr. Radine
7 is on vacation, so I'm standing in, and I'm joined this
8 afternoon by my colleague Aaron Schlanger.

9 MR. BERGER: Good afternoon, Your Honor. It's
10 Mitchell Berger from Squire Patton Boggs for Bank of Palestine,
11 and I believe my colleague, Joe Alonzo, is on. Gassan Baloul
12 may be on as well.

13 THE COURT: Great. And I heard once again that the
14 AT&T conference line is recording. Let's hope it does a better
15 job than it did the last time, but in the meantime, I have
16 called you in, because you needed an immediate ruling, and I'm
17 going to read my ruling into the record, but then also write it
18 out as well. So just (audio interference) in writing, in case
19 the AT&T line doesn't work one more time.

20 So this is an order granting in part and denying in
21 part docket number 97, a motion to compel. At a discovery
22 hearing held on August 16th, 2022, I made a number of discovery
23 rulings on the record. Because of a malfunction of the
24 recording feature of the AT&T teleconference line, AT&T, at
25 least until now, has been unable to retrieve a copy of the

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1 recording. Accordingly, counsel had requested a more detailed
2 summary of the Court's ruling than appears in the docket entry.

3 Point (1) Court denied plaintiffs' request to appoint
4 an independent expert at this time and allowed time for its
5 vendor, Sullivan/Strickler, to determine whether Exabyte Tape 6
6 and DDS Tape 23 contain full backups of BOP's Swift system and
7 COBOL, C-O-B-O-L, based legacy core banking system during the
8 relevant period.

9 Point (2) The Court granted plaintiffs' request for
10 more transparency in Sullivan/Strickler's search. Specifically,
11 counsel and their IT experts shall meet and confer to discuss
12 the questions outlined at the hearing and in plaintiffs'
13 8/17/22 motion. They would meet together with
14 Sullivan/Strickler. Plaintiff may pose written and/or oral
15 questions as well as follow-up questions, as the meet and
16 confer is intended to be a dialogue to ensure that both sides
17 understand the nature of Sullivan/Strickler's search.
18 Sullivan/Strickler shall respond directly to plaintiffs'
19 questions and should be a part of the discussion.

20 Defendant's expert, Mr. Regard, shall not answer in
21 Sullivan/Strickler's stead. Sullivan/Strickler, however, may
22 consult with Mr. Regard at any point during the meeting.

23 Plaintiffs also requested to be copied or otherwise
24 included in any correspondence or other communication between
25 Bank of Palestine and Bank of Palestine's counsel or Bank of

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1 Palestine's expert, on the one hand, and Sullivan/Strickler on
2 the other. That request is denied at this time, without
3 prejudice to plaintiff seeking such information through a more
4 formal discovery process at a later date, upon a showing of
5 good cause.

6 So that's the end of my ruling. Are there any points
7 in that ruling -- I'm not asking you to say whether you agree
8 with it -- but any points that I have missed that are critical
9 to the parties continuing with this discovery?

10 Let me ask that question of plaintiffs' counsel first.

11 MR. OSEN: Thank you, Your Honor. There are a couple
12 of points of clarification that would be beneficial to us. The
13 first one relates to the nature of the discussion with
14 Sullivan/Strickler. In the past, communication with IT
15 counsel, BOP's counsel, forbade any questions from counsel on
16 the call. We would anticipate that such a discussion would
17 predominantly be conducted by our IT consultant, who has,
18 obviously, vastly greater knowledge of the technical aspects of
19 this, but we wanted to be clear and get guidance from the Court
20 as to whether we are prohibited from asking any questions, as
21 Mr. Berger insisted was the case last time.

22 THE COURT: Right. Well, this is what the ruling
23 says. Tell me if you need more than this. Specifically,
24 counsel and their IT experts shall meet and confer with
25 Sullivan/Strickler to discuss the questions outlined at the

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1 hearing and in plaintiffs' August 17th motion. Plaintiff may
2 pose written and/or oral questions as well as follow-up
3 questions to Sullivan/Strickler, as the meet and confer is
4 intended to be a dialog to ensure that both sides understand
5 the nature of Sullivan/Strickler's search.

6 Sullivan/Strickler shall respond directly to
7 plaintiffs' questions and should be a part of the discussion.
8 Defendant's expert, Mr. Regard, shall not answer in
9 Sullivan/Strickler's stead. Sullivan/Strickler, however, may
10 consult with Mr. Regard during the meeting.

11 Does that cover the issues?

12 MR. OSEN: I believe it does, Your Honor. but just to
13 be clear. In the past, plaintiffs has been construed by Mr.
14 Berger to mean only plaintiffs' IT consultant. We think it's
15 clear, Your Honor, that those questions come from plaintiffs
16 inclusive of both counsel and IT experts, but if I have that
17 wrong, I'd rather have that now than have an emergency request
18 to the Court later.

19 THE COURT: No, you have it right.

20 MR. OSEN: Okay. The only other question I have at
21 this time, Your Honor, is whether we are specifically limited
22 to a single meet and confer with Sullivan/Strickler, obviously
23 subject to availability. Our experience from last time is that
24 it was principally a series of questions asked by us, or I
25 should say, by our IT consultant, which, in that case Mr.

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1 Regard noted, took down, and then we received follow-up
2 responses from BOP's counsel. We were hoping, and I think your
3 order covers this, that there can be some reasonable follow-up
4 both with Sullivan/Strickler by email and/or if it's
5 productive, with another call.

6 THE COURT: So you're thinking of a situation where
7 Sullivan/Strickler either hasn't reached the point where it's
8 able to respond to a particular question or needs some time to
9 research the answer?

10 MR. OSEN: Correct, Your Honor. Sometimes a question
11 comes up, did you try this or did you do that, and the
12 reasonable response in the moment might be, I don't know the
13 answer to that at the moment. We'll get back to you.

14 In the prior IT conference in January, that was
15 accomplished -- the response was accomplished by written
16 letters from defense counsel. We're hoping that if it's
17 appropriate, and if the circumstances warrant, we can set up --
18 again, obviously, with defense counsel present and
19 participating for a follow-up. Whether that's short or long, I
20 can't say, because I obviously don't know what their initial
21 responses will be. But we are hoping, again, that this be a
22 dialog, rather than a simple one-off meeting in which
23 everything else then has to be papered in a formalized way, as
24 via ultimate letters and correspondence and so forth with
25 counsel.

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1 MR. BERGER: Your Honor, this is Mitchell --

2 THE COURT: Yes.

3 MR. BERGER: -- Berger for Bank of Palestine. I don't
4 think the Court needs to make an order on this. I think we've
5 been flexible about follow-up, and I'm not going to, sort of,
6 do chapter and verse responding to what Mr. Osen said. We
7 spent three hours on the phone for meet and confer back in
8 January. We think we know how to foment a dialog, but we're
9 certainly not going to stand in the way of what Mr. Osen
10 described as reasonable follow-up.

11 But I do have a clarification request myself of Mr.
12 Osen. If not, I'll wait until he's done.

13 UNIDENTIFIED SPEAKER: No, I think -- sorry.

14 THE COURT: Let me just clarify, for the record, that
15 it is recording. I'll put it in the order as well. It
16 includes the parties (audio interference) reasonable follow-up.

17 MR. BERGER: Very good. So thank you, Your Honor.
18 It's Mitchell Berger again for Bank of Palestine. Could I put
19 the Court to the trouble of reading point 4 again, just so I
20 don't ask the Court to clarify something that may be clarified
21 by point 4?

22 THE COURT: Well, I have point 3.

23 MR. BERGER: Ah.

24 THE COURT: It's a request to be copied or otherwise
25 included in any correspondence or other communication between

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1 BOP, BOP's counsel, or BOP's expert, on the one hand, and
2 Sullivan/Strickler, on the other, is denied at this time
3 without prejudice to plaintiff seeking such information through
4 discovery at a later date, upon a showing of good cause, if
5 necessary.

6 MR. BERGER: Okay. Thank you, Your Honor.

7 THE COURT: Is that what you --

8 MR. BERGER: Yes, that's helpful. So the question I
9 had was, and Your Honor, perhaps it's point 2 about pose
10 written and oral questions. I certainly understand the oral
11 question part, and that will take place at the meet and confer.

12 I just want to make sure that we avoid any confusion
13 here. In terms of written questions, is the notion that
14 plaintiffs' counsel will deliver those questions in advance of
15 the meet and confer so that they can be addressed at the meet
16 and confer, and if so --

17 THE COURT: Right.

18 MR. BERGER: -- it would be delivered through us? I
19 mean, we're not trying to stand in the way here, but we do not
20 want, and I think it's consistent with point 4, which is these
21 are people working for us. Plaintiffs can ask whatever
22 questions they want to, but if they're written questions, they
23 ought to be sent to us. And we will undertake, consistent with
24 the Court's order, to make sure that those questions are
25 delivered to Sullivan/Strickler to be answered, consistent with

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1 the Court's conditions, at the meet and confer. And if the
2 dialog at that meet and confer isn't sufficient, and reasonable
3 follow-up is necessary, then we'll reconvene and do it again.
4 Just want to make sure that is with the Court envisions.

5 THE COURT: That is. And I was thinking of a more
6 informal version of a 30(b) (6) list of topics, so that it would
7 be efficient for both sides to have alerted each other what the
8 (audio interference).

9 MR. BERGER: The Court was cutting out there, but I
10 think I heard Your Honor say that it's meant to be a more
11 informal version of a 30(b) (6). They'll provide us, meaning
12 counsel for BOP, the questions in advance, so that we have
13 notice and can provide them to Sullivan/Strickler, which,
14 consistent with the Court's, I believe it's point 3, shall
15 respond directly and not having Mr. Regard respond in
16 Sullivan/Strickler's stead, so that what we would anticipate is
17 receiving questions in writing in advance of the meet and
18 confer from plaintiffs' counsel, and we will, consistent with
19 the Court's order, provide them to Sullivan/Strickler in
20 advance of the meet and confer, so that they can't say, oh, we
21 didn't know that was coming. We're not prepared to answer
22 that.

23 THE COURT: Right. Yeah. Were there other parts of
24 what I read that cut in and out, or is that the only part that
25 needs to be clarified?

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1 MR. BERGER: Oh, no. Everything Your Honor read was
2 clear. There was just, as Your Honor was providing the
3 clarification I requested, there were just one or two words
4 that cut out. But I repeated what I thought I heard from the
5 Court.

6 THE COURT: Yeah. You've captured my intent
7 perfectly.

8 MR. OSEN: Your Honor, this is Gary Osen for the
9 plaintiffs. One question, and forgive me if I've got this --
10 was mistaken, but I thought I heard, when you first read the
11 order, that we could communicate directly with
12 Sullivan/Strickler --

13 THE COURT: Yes.

14 MR. OSEN: -- copy defense counsel, not through
15 defense counsel. But if I'm mistaken about that, forgive me.

16 MR. BERGER: Yes. I heard the opposite, Your Honor.
17 In terms of the 30(b)(6) analogy, the notice would be served on
18 us. It wouldn't be served directly on a witness.

19 THE COURT: There are two stages where this comes up.
20 The first is just notification, like the 30(b)(6), and that
21 should go to counsel and Sullivan/Strickler together at the
22 same time. And the second, really, is to be able to speak
23 directly to Sullivan/Strickler at the meet and confer.
24 Plaintiffs do not have to go through counsel or the IT expert
25 to pose questions directly to Sullivan/Strickler.

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1 Does that clarify your question?

2 MR. OSEN: Okay. Yes. So if I understand correctly,
3 and I'm sorry, Your Honor, but I think the time savings, in the
4 long run, is worth it. So we are not permitted to email our
5 questions directly to Sullivan/Strickler. All written
6 communications, as I understand what you're saying, have to go
7 through Mr. Berger.

8 THE COURT: Well, I'm not sure that it makes a
9 difference. My thought was that you would send it to Mr.
10 Berger with a cc to Sullivan/Strickler, so that they would get
11 it at the same time.

12 MR. OSEN: Well, that would be fine with us, Your
13 Honor, but of course we would need the contact information for
14 the relevant parties there in order to do so.

15 MR. BERGER: And Your Honor, this is Mitchell Berger.
16 We don't have any problem with them copying on it, but what I
17 understood, and this is the key part for us, is that
18 Sullivan/Strickler is not going to be then emailing plaintiffs
19 back with the answers. They are going to be questioned about
20 those notice topics at the meet and confer directly, as Your
21 Honor said.

22 THE COURT: Yes. That's correct.

23 MR. BERGER: Okay.

24 THE COURT: And the reason I didn't want to just
25 publish the order without (audio interference) to you first is

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1 I wanted to be sure that any of your questions were answered.

2 So are there any other questions? Let me know.

3 MR. BERGER: The only other question I had, Your
4 Honor, and this was something I believe I heard. If I misheard
5 at the last hearing, then I'm sure the Court will correct me.
6 But now that we have a detailed procedure here, what I had
7 heard was that we needed to get the meet and confer done by
8 September 16th, bearing in mind that there will be an allowance
9 for reasonable follow-up. I just want to make sure that, in
10 essence, the end date by which we should have commenced and
11 then finished the meat and confer process will be on September
12 16th, so that we're not talking about needing to make sure
13 everybody is ready tomorrow and the like.

14 THE COURT: That's right. Does that still work for
15 everyone?

16 MR. OSEN: This is Gary Osen for the plaintiffs. Your
17 Honor, I think we had suggested that date, so we're perfectly
18 fine with making that work and obviously providing questions.
19 Once we have the proper contact people at Sullivan/Strickler,
20 we'll send our, sort of, preliminary questions -- our, sort of,
21 informal 30(b) questions significantly in advance of that date,
22 whatever that date is, before September 16th.

23 THE COURT: All right. Yes. So the answer is yes.
24 That is our date.

25 MR. OSEN: Yes.

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1 THE COURT: Great.

2 MR. BERGER: Thank you, Your Honor.

3 THE COURT: Okay. All right. Good luck, everyone.

4 MR. BERGER: All right. Thanks very much. Take care.

5 MR. OSEN: Thank you.

6 MR. BERGER: Right. Bye-bye.

7 (Court is adjourned)

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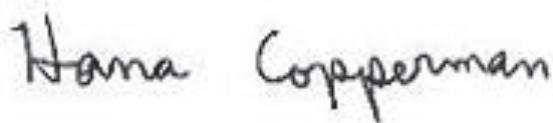
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1 C E R T I F I C A T I O N
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3 I, Hana Copperman, court-approved transcriber, do
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6 in the above-entitled matter.

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9 September 4, 2022

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Hana Copperman, CET-487

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